**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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|---|---|---|
| **IN RE:** | ) | **Bankruptcy Case** |
| | ) | **No. 98 B 09948** |
| **KEITH D. FERRELL** | ) | |
| | ) | |
| **Debtor.** | ) | |
| ---------- | ) | |
| **KEITH D. FERRELL,** | ) | |
| | ) | **Adversary Proceeding** |
| **Plaintiff,** | ) | **No. 98 A 01442** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **UNION ACCEPTANCE CORPORATION,** | ) | **Judge Erwin I. Katz** |
| | ) | |
| **Defendant.** | ) | |

## MEMORANDUM OPINION

This adversary proceeding relates to the bankruptcy case filed by plaintiff-debtor Keith D. Ferrell ("Ferrell") under Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 101 et. seq. Through a Adversary Complaint ("Complaint"), Ferrell attempts to challenge on behalf of himself and a putative class, certain claims filing practices of Union Acceptance Corporation ("UAC"). Ferrell challenges UAC's allegedly common practice of filing proofs of claims in Chapter 13 cases in which UAC does not bifurcate its claim into secured and unsecured components, but instead lists the entire claim as secured. Ferrell alleges that this practice is contrary to the instructions of Official Form 10. Ferrell's Complaint purports to asserts three causes of actions: (1) under the Illinois Consumer Fraud Act, (2) under 11 U.S.C. § 105 of the Bankruptcy Code, and (3) under state common law for unjust enrichment.

The matter before the Court is UAC's Motion to Dismiss for failure to state a claim. For the following reasons, the Motion to Dismiss is granted.

## JURISDICTION

Jurisdiction is proper under 28 U.S.C. § 1334(b) and Local General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(C). Venue lies under 28 U.S.C. § 1409.

## BACKGROUND AND PLEADINGS

In 1995, Ferrell purchased a 1990 Grand Prix. Ferrell financed the car by means of a retail installment contract that was assigned to UAC. The cash price of the car was $14,008.

Ferrell filed for bankruptcy. Subsequently, on or about April 14, 1998, UAC filed a proof of claim in Ferrell's Chapter 13 case. The proof of claim listed the secured portion of the claim as $13,866. This amount consisted of the account balance owing on the retail installment contract, an amount greater than the value of the car. Ferrell alleges that listing the account balance is not proper because the proof of claim form states "a claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim." Thus, the person preparing a proof of claim form is told, Ferrell alleges, that the amount to be listed as a "secured claim" is the "value of the property" that serves as the collateral for the debt.

On July 20, 1998, Ferrell filed an Objection to Automobile Claim of UAC ("Objection") pursuant to Fed. R. Bankr. P. 3007. In the Objection, Ferrell alleged that UAC had filed a "secured gross claim" without a deduction for unmatured interest in violation of 11 U.S.C. § 502(b)(2). Ferrell requested that UAC's secured claim be reduced to the appraised value of the

car; that UAC be given leave to file an additional unsecured claim; and that Ferrell's attorney be reimbursed for the cost of the appraisal done on the car. On August 20, 1998, this Court heard and entered an Order granting Ferrell's Objection. This Court ordered that UAC's claim be bifurcated into secured and unsecured components with the secured component corresponding to the appraised value of the car, $6,300. In addition, UAC was given leave to file an unsecured claim computed as $13,866, less unmatured interest, less $6,300, calculated as of April 1, 1998. Lastly, it was ordered that Ferrell's attorney be reimbursed $50 for the cost incurred in having an appraisal done.

Ferrell alleges that UAC regularly files proofs of claims in bankruptcy proceedings that intentionally inflate and misrepresent the value of UAC's collateral. The intent of the practice, Ferrell alleges, is to take advantage of customers who are financially unable to protect themselves against UAC. Because the claims are automatically allowed pursuant to11 U.S.C.§ 502 unless the debtor objects to them, the effect of UAC's practice, Ferrell alleges, is to give debtors the choice of paying the inflated amounts or incurring legal and appraisal fees to challenge UAC's claims.

UAC makes the following arguments to support granting its Motion to Dismiss: (1) that the Complaint is Ferrell's second attempt to litigate the proof of claim and is thus barred by res judicata; (2) that the 11 U.S.C. § 105 claim should be dismissed because there is no private right of action under the provision; (3) that the claim for unjust enrichment and consumer fraud should be dismissed because both are preempted by the Bankruptcy Code; and lastly, (4) Ferrell fails to adequately plead injury under the Illinois Consumer Fraud Act.

## DISCUSSION

UAC's Motion to Dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(6), which

challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7012. In considering a motion to dismiss, the court must accept the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. LeBlang Motors, Ltd., v. Subaru of Am., Inc., 148 F.3d 680, 690 (7th Cir. 1998); Bontowski v. First Nat'l Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993). Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. Thomason v. Nachtrieb, 888 F.2d 1202, 1204 (7th Cir. 1989).

**RES JUDICATA**

UAC argues that in the Complaint, Ferrell articulates essentially the same challenge to UAC's proof of claim that Ferrell presented in his Objection and therefore the Complaint is barred by res judicata. Ferrell counters that the claims in the Complaint are different from the issues litigated because now Ferrell seeks redress for an abusive claims filing practice rather than a valuation of UAC's secured claim.

The doctrine of res judicata bars relitigation of claims that were asserted or could have been asserted in an earlier action. D & K Properties Crystal Lake v. Mutual Life Ins. Co., 112 F.3d 257, 259 (7th Cir. 1997). The doctrine applies in the bankruptcy context. Crop-Maker Soil Servs., Inc., v. Fairmount State Bank, 881 F.2d 436, 439 (7th Cir. 1989). "Res judicata reflects fundamental public policy that there be an end to litigation, which is particularly strong in the bankruptcy context." Hawxhurt v. Pettibone Corp., 40 F.3d 175, 180 (7th Cir. 1994). In order for res judicata to apply, three elements must exist: (1) a final judgment on the merits in a prior action; (2) an identity of the cause of action in both the prior and subsequent suits; and (3) an

identity of parties or privies in these suits. Id.

Indisputably, two element are present. Ferrell and UAC were parties to the Objection and are parties to the present adversary proceeding. Moreover, the Order which required the bifurcation of the claim into secured and unsecured components, satisfies the first element: a final judgment on the merits. See In re Wade, 991 F.2d 402, 406 (7th Cir. 1993)(an order allowing or denying a claim is final and appealable); Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 742 (5th Cir. 1993)(an order allowing a claim is a final judgment for res judicata purposes).

The only element at issue is an identity of the causes of action. Res judicata "requires litigants to join in a single suit all legal and remedial theories that concern a single transaction." Perkins v. Board of Trustees of the Univ. of Ill., 116 F.3d 235, 236 (7th Cir. 1997). For purposes of res judicata, two claims are so closely related that they constitute the same transaction if they are "based on the same, or nearly the same, factual allegations". Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226 (7th Cir. 1993).

The question raised in the Objection was the value of Ferrell's car. The relief requested in part, the reduction of the secured claim to the value of the car. In the Complaint, Ferrell alleges that UAC routinely filed proofs of claims in which it listed as secured, an amount greater than the value of the collateral in order to mislead debtors. Thus, both the Objection and the Complaint arise out of the same general factual allegations: UAC filed a proof of claim in which the secured claim was greater than the value of the collateral. Ferrell could have asserted the claims for UAC's allegedly abusive practice and his request for damages, attorney's fees, litigation expenses, and injunctive relief in connection with his Objection. Ferrell had the foresight to include in the Objection a request for a refund of the appraisal cost. Similarly, Ferrell could have included a

request for the other relief now sought; there were no obstacles to raising these claims in the Objection. See Williams v. Transouth Financial Corp. (In re Williams), No. 98-A-00895, slip op. at 5 (Bankr. N.D. Ill. October 1, 1998)(a plaintiff's prior objection to the creditor's proof of claim barred, under the doctrine of res judicata, the subsequent adversary complaint).

Accordingly, there is an identity of the causes of action, and all elements of res judicata are therefore present.

Ferrell argues that assuming arguendo that res judicata applies, courts have refused to give preclusive effect to prior actions where protection of the public interest is at stake. Ferrell relies on Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 300 (7th Cir. 1979) for that proposition. In Porter, the court found that the FTC was not precluded from litigating claims involving non-prescription weight reducing tablets, even though the Postal Service had litigated prior cases involving similar false advertising and safety claims concerning the tablets. The court found, in the Restatement (Second) of Judgments § 68.1(e)(i) (Tent. Draft No. 4, 1977), an exception to the preclusive effect of a judgment when the public interest is at stake. Id. The court then referred to Comment H which gave as an example of the § 68.1(e)(i) exception an action by "an agency of government . . . for the protection . . . of a broad segment of the public." Id. Relying on the Restatement, the court found that the FTC claims involved "a body of knowledge in the fields of medical and pharmacological science that is constantly increasing. The government is not precluded from subsequently relitigating against a new respondent under these circumstances." Id.

Ferrell's case is not a proceeding by an agency of the government, nor does this case involve public health risk and false advertising. Therefore, Ferrell's argument concerning the "protection of the public interest" exception to preclusion is without merit in this case.

## CONCLUSION

For the above reasons, the Motion to Dismiss is granted.

Entered:

Date:

_____
Honorable Erwin I. Katz
United States Bankruptcy Court